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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEAN J. WOODBURN,

Petitioner - Appellant,

v.

TERRY L. STEWART, Director; et al.,

Respondents - Appellees.

No. 04-16567

D.C. No. CV-01-02525-NVW

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Arizona
Neil V. Wake, District Judge, Presiding

Submitted November 14, 2005^{**}
San Francisco, California

Before: NOONAN, RYMER, and GOULD, Circuit Judges.

Dean Joseph Woodburn appeals from the district court's denial of his petition for a writ of habeas corpus as untimely. This Court issued a Certificate of Appealability concerning "whether appellant is entitled to equitable tolling of the

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Antiterrorism and Effective Death Penalty Act's one-year statute of limitations on the basis of his mental competency." We vacate and remand for further factual development of Woodburn's mental incompetence claim.

Petitioner Dean Joseph Woodburn repeatedly alleged that he was incompetent in verified *pro se* filings. In an affidavit attached to his February 6, 2002 habeas filing, D.C. Doc. 4, Woodburn alleged that he was not competent at the time of his trial, and that his incompetence continued as of the date of the affidavit:

It was a violation of (Mr. Woodburn's) due process, for denial of a full and factually complete competency hearing [at the time of sentencing, in 1997]. . . . A judge is trained in the law, not psychiatry or psychology. There is *no* reason to think this judge was equipped to spot – let alone assess – a *bipolar condition* and it's effect on Woodburn's competency to plead. . . . Defendant Mr. Dean J. Woodburn, has "*Never*" been "*Deemed Competent*."

Based on the aforementioned issue's this petitioner prays that this court will reverse conviction and demand a retrial do to the psychiatries [sic] opinion, Dr. Thomas N. Thomas, and evidence presented in this petition.

I believe it's a travesty of justice to incarserate [sic] a mentally ill person in prison, where they can be harmed by ignorance of the others, staff and inmates who can't understand the frailties of the human mind. At this present time I am at a mental health unit – Aspen-SPU-Prison. This is to get help with my mental health disorders.

D.C. Doc. 4 at 3-5 (emphasis in original).

In a "Motion for Appointment of Counsel" filed August 27, 2003, Woodburn requested appointed counsel because he "cannot represent himself as he

is incompetent under the law. . . . Mr. Woodburn does not have the expertise nor the competence to proceed on his own.” D.C. Doc. 26 at 1. The pleading was *pro se* and was signed by Mr. Woodburn. This assertion of incompetence in 2003 combines with the above assertions of incompetence in 1997 and 2002 to imply incompetence during the AEDPA limitations period in 2000-2001.

Under *Laws v. Lamarque*, 351 F.3d 919 (9th Cir. 2003), a habeas petitioner is entitled to a remand for further factual development of his claim of equitable tolling due to mental incompetence whenever the petitioner alleges “in a sworn pleading, against which the state has offered no evidence at all, that he was incompetent in the years when his petitions should have been filed.” *Laws*, 351 F.3d at 923. Woodburn has made such an allegation. Accordingly, the district court’s denial of Woodburn’s habeas corpus petition for untimeliness is VACATED AND REMANDED for further factual development of his mental incompetence claim.